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No. 90-1963

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NICHOLAS DAMER,
Petitioner,
v.

SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

GERALD C. STERNS; LAW OFFICES OF GERALD C. STERNS, A California Professional Corporation; JOHN C. ELSTEAD; ELIZABETH W. WALKER; WEIL ADJUSTERS AND CONSULTANTS, INC., A California Corporation; LAWYERS MUTUAL INSURANCE COMPANY, A Corporation; GERSON MEHLMAN; and ROBERT DENEBEIM,

Real Parties in Interest.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WERE THE FEDERAL QUESTIONS RAISED BEFORE THE CALIFORNIA COURTS IN A TIMELY MANNER?

II. DID INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT?

III. IS A JURY TRIAL GUARANTEED FOR AN INDIVIDUAL AT A CRIMINAL CONTEMPT PROCEEDING WHEREIN OVER $150,000.00 OF FINES ARE SOUGHT AGAINST THAT INDIVIDUAL?

IV. DID THE STATE PROCEEDINGS IN QUESTION DENY PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

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FACTS

The facts were set forth in full in the Petition for Writ of Certiorari. Please note: Real Parties' Briefs in Opposition did not cite to the record or provide supporting appendices. The briefs made many inaccurate statements, some patently improbable (e.g., that Petitioner's original Appendix C, the Smith/Sterns "phony costs" memo, was a "draft"; that Petitioner was able to get such a memo <u>from a lawyer's widow</u> with ex parte process rather than with non-judicial investigative techniques; and that Petitioner's former client happily embraced Real Parties' secrecy demands.) Some claims are inherently nonsensical.[1] Other claims <u>misstate California law</u>; e.g., Rule 3-700D (modelled on ABA ethics) in fact <u>affirms</u> a lawyer's right to <u>keep</u> a copy of his files, as does California discovery and "work product" law.

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[1] For example, if it is true that "... there was no restraint on petitioner's ... ability to report [Real Parties'] unethical conduct to any governmental agency" (page 3 of Elstead's brief) <u>why was Petitioner punished for disclosing such conduct to other courts</u>?

ARGUMENT

I. ALL THE FEDERAL QUESTIONS WERE RAISED BEFORE ALL THE CALIFORNIA COURTS AND IN A TIMELY MANNER

The original Appendix E, appended to the Petition for Certiorari that Petitioner filed in this cause, speaks for itself in setting forth multiple constitutional arguments. Similar constitutional arguments were also made in other California proceedings in this cause, as expressed in Appendix F to this instant Reply Brief.[2] Real Parties' claims -- that federal questions were not brought up in the California courts -- are unsupported by the facts. Indeed, the record in California shows that each such federal constitutional question was raised at the earliest relevant opportunity, in the four cumulative petitions for relief, and preserved for later review.

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[2]This final appendix is designated as the next in order of Petitioner's appendices; the last appendix in the June 25, 1991 Petition was labelled Appendix E.

II. NO INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT.

There are no opinions; hence, it is impossible to say that independent and adequate state grounds -- indeed any state grounds -- support the judgment. The first petitions to the California Court of Appeal and California Supreme Court -- designed to arrest imminent contempt proceedings and to void the "gag" and "dispossession" orders -- were denied as premature. The second petition to the California Court of Appeal was also denied without comment, as was the second petition to the California Supreme Court (Justice Mosk voted to grant.) Each successive petition incorporated state and federal constitutional challenges raised in earlier petitions, but no appellate court ever addressed any of these arguments at all.

III. A JURY TRIAL IS GUARANTEED FOR AN INDIVIDUAL AT A CRIMINAL CONTEMPT PROCEEDING WHEREIN FINES OF OVER $150,000 ARE SOUGHT AGAINST THE INDIVIDUAL DEFENDANT

Arguing against the above proposition, Real Parties cite Muniz v. Hoffman, 422 U.S. 454 (1975), contending that case stands for this rule: "right to jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment" (page 6 of Elstead's brief, page 8 of Sterns'.)

The Muniz Court is better understood from reading the opinion at 422 U.S. 477:

" ... we cannot accept the proposition that a contempt must be considered a serious crime under all circumstances where the punishment is a fine of more that $500, unaccompanied by imprisonment ... it is not tenable to argue that the possibility of a $501 fine

would be considered a large risk to a large corporation or [the involved] labor union ... we cannot say that the fine of $10,000 imposed on Local 70 in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake. This union ... collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to a jury trial it might have under the Sixth Amendment."

The impact on the individual union members in Muniz (who were not personally ordered to pay any fine) was inconsequential -- less than $8 would need to be assessed against each member even if the union treasury were empty when the fine was due.

This is hardly the situation that confronted Petitioner; the record shows that over $150,000 of fines were sought from him,

and from him alone. But a reply to his many oral and written requests for an open, jury trial was deferred when Real Parties insisted on preventing any public trial; and then, in a retroactive effort to validate the completed non-jury, secret proceedings, the hearing judge, two weeks after the contempt trial ended, noted that since imprisonment -- as an immediate penalty -- was waived by the prosecuting Real Parties, no jury trial was necessary, and a mere $3,000 fine was implicitly constitutionally permissible.

Additionally, Real Parties have not met Petitioner's argument that the State of California denied him the equal protection of its own laws in refusing to grant him a jury trial, a right conferred by California statute, as set forth in Mitchell v. Superior Court (1989) 49 C.3d 1230, 265 Cal. Rptr. 144 (a case also acknowledging the trend, noted in Muniz, to extend the federal right also.)

IV. THE STATE PROCEEDINGS IN QUESTION DENIED PETITIONER DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS

At Page 8 of Real Party Sterns' brief, the author claims "petitioner has had, and continues to have, access to the California Courts of Appeal, and he has exercised this right on numerous occasions". This follows a quote from a California Court of Appeal case describing the procedure to be used in such Court, when dealing with the filing of documents previously sealed by a trial court.

What Real Party Sterns fails to note is that Petitioner was held in contempt not for openly filing sealed documents in the Court of Appeal, but for merely filing any petition at all in that Court, "without that petition being filed under seal" (see the contempt judgment, quoted at page 30 of the Petition.)

This conduct was a violation of the oral injunction of March 9, 1990 "directing [Petitioner Damer] to refrain from discussing this case or the settlement thereof with the press or with any other person ..." (see pages 26 and 27 of the Petition herein, quoting from the Order To Show Cause that led to the contempt hearing and judgment.)

The oral "gag" order, by its own very terms, forbade "discussing" the case, by spoken or written word, with any person, including even any appellate court clerk. Intellectually honest men and women cannot contend that such an order is consistent with the First, the Fifth, the Sixth and the Fourteenth Amendments to the Constitution.

The order in question must also be noted in the context of other directives of the trial judge, given the same March 9, Friday afternoon, after the Court of Appeal closed, and requiring Petitioner to surrender his

property at 9:00 a.m. on the morning of the next court day, before the Court of Appeal could even be approached for a stay preventing Petitioner from soon being in contempt.

The operative effect of all these proceedings was just as they were planned by Real Parties -- to deny Petitioner any meaningful appellate remedy in any forum, and to force Petitioner to choose between: (1) surrendering his files and all copies of those files; and (2) being prima facie in contempt.

No reasonable, present day analysis can accord due process or equal protection with the notion that a person can be held in contempt for merely prosecuting an appeal from the orders of the sort here challenged. Petitioner was "singled out" and successfully prosecuted, with the blight of a "criminal" conviction on his record as a lawyer, solely for refusals to suppress proof of wrongdoing on the part of influential Real Parties.

It is undisputed that California grants open, plenary appellate remedies to persons who commit even the pettiest of crimes, and that the state constitutional appellate process must produce a written, publicly reviewable opinion explaining why the trial court's judgment should endure undisturbed.

It is equally undeniable that the history of this present controversy involved secret hearings that generated the oral orders whose alleged disobedience led to the contempt prosecution; that said criminal prosecution was itself conducted in secret, over Petitioner's objections, without a jury, by another trial-court-level judge who declined to consider any challenges to the original orders that were allegedly violated; that the Court of Appeal allowed no plenary remedy whereby the merits of the trial court's contempt judgment could be reviewed; and that the state Supreme Court did likewise.

In this bicentennial year of the Bill of Rights, this Supreme Court should use this case to hold a lawyer's private files and confidences may not be invaded, seized or sold against his will; to declare the right of jury trial in cases of this sort; to proclaim that due process must necessarily include a meaningful appellate review of any adjudication of criminality; and to rule that equal protection of the laws is not afforded by any state that denies such a trial or review only to citizens prosecuted for a criminal contempt.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted, and that the California Supreme Court be ordered to review Petitioner's case.

Respectfully submitted,

Nick Damer

Nicholas Damer
In Propria Persona

APPENDIX F

EXTRACT FROM THE FIRST COURT OF APPEAL BRIEF (PETITION FOR WRIT OF MANDATE, ET CETERA, 1 CIV. AO49125)

II. The Fourth Amendment of The United States Constitution, And Pertinent State Law As Well, Prohibit The Respondent Court From Issuing Its Order Compelling The Seizure of Petitioner's Case Files And Barring Petitioner From Making Copies of The Same; Likewise, Respondent Court's Unfounded, Indefinitely Extended "Gag" Order Is Forbidden By the First Amendment's Guarantee of Freedom of Speech

....B. As The Case Files [of Petitioner] Containing Petitioner's Work Product And Confidences Constitute Property of Petitioner, The Fourth Amendment Forbids Their Seizure And The First Amendment Permits Their Potential And Appropriate

Post-Trial Dissemination **[thereafter citing several U.S. Supreme Court cases; this first Petition was denied as "premature" since Damer had not yet been held in contempt.]**

EXTRACT FROM THE FIRST PETITION TO THE CALIFORNIA SUPREME COURT (filed in April of 1990, and denied, presumably on grounds of prematurity per New York Times v. Superior Court, by an order signed by Justice Mosk, who voted to grant the final, 1991 petition to the California Supreme Court)

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... (Petitioner also adopts the Table of Contents of the Petition filed in the Court of Appeal (AO49125) and all of the arguments made there.) [Emphasis added.] ... Petitioner can [and did] now present this Supreme Court with ... another copy of the Petition filed March 30 in the Court of Appeal ...

EXTRACT FROM THE SECOND CALIFORNIA COURT OF APPEAL BRIEF (PETITION FOR WRIT OF CERTIORARI, ET CETERA, 1 CIV. AO51211)

IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. THE JUDGMENT OF CONTEMPT MUST BE OVERTURNED IN LIGHT OF THE DENIALS OF CONSTITUTIONAL AND STATUTORY RIGHTS OF DUE PROCESS

This point is discussed at length in the OPPOSITION TO ORDER TO SHOW CAUSE filed August 10, 1990 (see pages 8-11, 15-18, and 31-33 [wherein numerous federal constitutional due process guarantees were noted as pertaining to the contempt matter.])

Real Parties' mid-hearing waiver of imprisonment penalties did not excuse the necessity for a jury trial [citing U.S.v.HAMDAN (1977) 552 F.2D 276]....

E. THE PURPORTED MARCH 9, 1990 "GAG" ORDER IS VOID ON ITS FACE

....the [comprehensive post-trial "gag" order on Petitioner and all trial jurors] would be in clear conflict with [federal] constitutional guarantees ...

... Petitioner incorporates herein, by reference, all materials and arguments provided by him relating to said [original March 30, 1990] Petition [in the Court of Appeal], and requests this Court of take judicial notice of its own files in this regard.

EXTRACT FROM THE SECOND CALIFORNIA SUPREME COURT BRIEF (PETITION FOR WRIT OF REVIEW, CERTIORARI, OR OTHER APPROPRIATE RELIEF)

III. D. THE COURT OF APPEAL'S SUMMARY DENIAL, OF THE ATTEMPT TO OVERTURN A CONVICTION OF CRIMINAL CONTEMPT, VIOLATES PETITIONER'S RIGHTS, UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, TO THE ISSUANCE OF A WRITTEN OPINION IN A "CAUSE" ON APPEAL, PARTICULARLY WHERE CONSTITUTIONAL OBJECTIONS ARE RAISED

(PLEASE SEE ALSO THE EXTENSIVE APPENDIX E TO THE PETITION FOR WRIT OF CERTIORARI IN THIS CAUSE.)